

ORIGINAL

DOCKETED

JUN 04 2015



0000163377

DOCKETED BY

DAB

BEFORE THE ARIZONA CORPORATION COMMISSION

2015 JUN -4 P 3:40

COMMISSIONERS

SUSAN BITTER SMITH, Chairman  
BOB STUMP  
BOB BURNS  
DOUG LITTLE  
TOM FORESE

AZ CORP COMMISSION  
DOCKET CONTROL

In the matter of:

MICHELLE LEE WAGNER (CRD No.  
2403647),

Respondent.

DOCKET NO. S-20916A-14-0328

**SECURITIES DIVISION'S REPLY  
BRIEF**

**Hearing Date: March 4, 2015**

**Assigned to Administrative Law  
Judge Mark Preny**

The Securities Division ("Division") of the Arizona Corporation Commission ("Commission") submits its Reply Brief ("Reply") to Respondent Wagner's Post-Hearing Brief and Response to Securities Division's Post-Hearing Brief filed on ("Response"). Capitalized terms in this Reply have the same definitions as in the Division's Post-Hearing Brief ("Brief"). This Reply is supported by the following Memorandum of Points and Authorities.

**MEMORADUM OF POINTS AND AUTHORITIES**

Most of the issues raised in the Response were addressed in the Division's Brief. A few additional points from Respondent's Response warrant discussion.

**This case is the action of a regulatory agency and Wagner's contract/bankruptcy dispute with her former client is irrelevant.** Respondent candidly admits that the additional facts described in her Response do not affect the elements of the actual violation at issue. Rather, these facts offer a "whole picture." Respondent attempts to characterize this action as largely being between Wagner and LP, a "vengeful" former client. Respondent suggests that her contract and bankruptcy disputes with LP may result in those courts not holding Wagner liable for any deficiency judgments from the loan at issue. While that is far from certain, it is irrelevant.

1 This action is for Respondent's violation of the Securities Act. These violations create a  
2 separate debt independent of Respondent's contract and bankruptcy disputes with LP. And they are  
3 brought by the Securities Division under its authority as a regulating agency, not on behalf of LP.  
4 It should be no surprise to Respondent that in the highly-regulated industry of securities sales,  
5 there are obligations and penalties that are separate from and in addition to those in non-regulatory,  
6 private-party disputes.

7 **A violation of A.R.S. § 44-1962(A)(10) is a violation of the Securities Act subject to all**  
8 **the penalties listed in A.R.S. § 44-1962(B).** Respondent argues that violating A.R.S. § 44-  
9 1962(A)(10) and 14-4-130(A)(15) is a "technical violation" of the Securities Act and that a  
10 violation of a rule prohibiting unethical and dishonest conduct is less serious than a violation for  
11 fraud. Respondent cites no authority defining a "technical violation" or for this position.

12 The Securities Act contains a separate provision for fraud. But that provision is not at issue.  
13 The violation, and the penalties available for that violation are both found in A.R.S. § 44-1962. As  
14 stated in that section, a registered salesman who violates 44-1962(A) may be liable as described in  
15 44-1962(B).

16 In cases where the Commission has entered orders against brokers for violation of 14-4-  
17 130(A)(15), the Commission has always ordered full restitution. Respondent correctly notes that  
18 two of the decisions cited in the Brief included a violation of A.R.S. § 44-1991 and two of the  
19 decisions included more than one customer loan. All four of these decisions were consent orders  
20 (i.e. the respondents cooperated with the Division in reaching an outcome, which was not the case  
21 here). In each decision except *In re Attila Toth*, the order included a higher penalty for the higher  
22 number of violations.

- 23 • In *In re Attila Toth*, the registered salesman obtained a \$70,000 loan from a client and did  
24 not use the full loan as represented. The Commission found that Toth violated A.R.S. §§  
25  
26

1 44-1991 and 44-1962(A)(10). The Commission ordered a \$1,000 penalty and permanent  
2 revocation.<sup>1</sup>

3 • In *In re Anthony Ray Stacy*, the salesman obtained a \$130,000 loan from a client and failed  
4 to repay it. He also used the funds for personal use and the Commission found that Stacy  
5 violated A.R.S. §§ 44-1991 and 44-1962(10). The Commission ordered a \$10,000 penalty  
6 and revocation of Stacy's salesman registration.<sup>2</sup>

7 • In *In re Britt M. Lachemann*, the Commission found only a violation of A.R.S. § 44-  
8 1962(10), but there were three loans. The Commission ordered \$10,000 penalty and  
9 revocation.<sup>3</sup>

10 • In *In re Lynn R. Goldney*, the registered salesman solicited 26 customers for \$255,175 of  
11 loans. At the time of the Decision, Goldney still owed \$98,835 to 14 customers. For his  
12 violation of 1962(10)—no separate finding of fraud—the Commission revoked his  
13 securities salesman registration and assessed a \$10,000 penalty.<sup>4</sup>

14 As these cases make clear, the Commission has consistently ordered full restitution for  
15 violations of 44-1962(10), even when there was no fraud violation. Where there was more than one  
16 violation of 44-1962(10), the Commission ordered a higher penalty. Here, where there is only one  
17 violation, the Commission can be expected to order a smaller penalty.

18 Respondent argues that standards found in a FINRA publication should be used as  
19 guidance. These guidelines are not Arizona law. And using FINRA's guidelines to interpret 44-  
20 1962(10) would be an issue of first impression for the Commission. Because the Legislature has  
21 instructed that the Securities Act be "liberally construed to effect its remedial purpose of protecting  
22 the public interest"<sup>5</sup> it would be inappropriate to adopt FINRA guidelines that might limit such a  
23

24  
25 <sup>1</sup> *In re Attila Toth*, Docket No. S-20782A-11-0019, Decision #72507 issued on 8/3/2011.

<sup>2</sup> *In re Anthony Ray Stacy*, Docket No. S-20909A-14-226, Decision #74849 issued on 12/18/2014.

<sup>3</sup> *In re Britt M. Lachemann*, Docket No. S-20894A-13-0351, Decision #74239 issued on 1/7/2014.

<sup>4</sup> *In re Lynn R. Goldney*, Docket No. S-20880A-13-0088, Decision #73766 issued on 5/8/2013.

<sup>5</sup> *Eastern Vanguard Forex v. Arizona Corp. Comm'n* 206 Ariz. 399, 410, 79 P.3d 86, 97 (App. 2003), citing 1951 Ariz. Sess. Laws, ch. 18, § 20.

1 purpose, especially where those guidelines were not put forth by the Commission and the  
2 Legislature.

3       **Respondent's subjective belief that LP was "like family" and LP's non-loan**  
4 **commercial transactions do not satisfy the exemption.** The exemption in R14-4-130(A)(15)  
5 requires that the customer be a relative. Persons with whom the registered salesman developed a  
6 close relationship and considered to be "like family" (according to the salesman) do not meet the  
7 exemption. Adopting such a standard would not only be contrary to the plain language of the Rule.  
8 It would also make the exception so easily available that the prohibition on making loans would be  
9 rendered meaningless.

10       The exemption also requires that the customer not be in the business of making loans.  
11 Without citing the record, Respondent states that it was uncontroverted that LP had made loans  
12 similar to those he made to Respondent. The record, however, only established that LP later sold  
13 the foreclosed office condominium and received a promissory note as part of the payment. This is  
14 very different from the transaction at issue—an actual loan—where LP transferred money to  
15 Wagner for her to use to buy a property held in her own name in exchange for payments of interest  
16 and principal (not in exchange for a property).

17       Additionally, Respondent's ignorance of the loan-prohibition in A.R.S. § 44-1962 and her  
18 belief that the loan was in her client's interest are not elements of the statute or of the defense. The  
19 statute contains no state-of-mind requirement or defense. And Arizona courts have interpreted  
20 other Securities Act provisions lacking a state-of-mind requirement as creating strict liability.<sup>6</sup>

21       **The Commission's order for any restitution would be a separate debt in bankruptcy**  
22 **created by a separate action—violation of the Securities Act.** The bankruptcy proceedings,  
23 including whatever result comes from LP's adversary proceedings, do not affect the Commission  
24 proceedings or orders. The Division devoted space in its Brief to discussing the automatic stay in  
25 bankruptcy because this Court asked both sides to explain how bankruptcy affects the

26  
<sup>6</sup> See e.g. *State v. Gunnison*, 127 Ariz. 110, 113, 618 P.2d 604, 607 (1980); see also *Rose v. Dobras*, 128 Ariz. 209, 214, 624 P.2d 887, 892 (App. 1981).

1 administrative proceedings. As the automatic-stay cases make clear, the bankruptcy proceedings  
 2 do not affect this action. Cases dealing with the automatic stay are also relevant to Respondent's  
 3 argument that there is no existing debt and that cases cited by the Division deal with situations  
 4 where a debt for securities violation existed prior to the bankruptcy filing. The cases make clear  
 5 that actions for violations of state securities law continue regardless of any bankruptcy  
 6 proceedings. Section 523(a)(19) further establishes and the debt created from such securities law  
 7 violations comes from any order "before, on, or after the date the petition is filed[.]"<sup>7</sup> Thus an  
 8 order by the Commission creates a separate debt.

9 This debt would not be dischargeable in any subsequent bankruptcy proceedings. Respondent  
 10 argues that Section 523(a)(19) only applies where there is fraud. This is incorrect. The language of the  
 11 statute is clear: it applies to violations of state securities law.<sup>8</sup> As noted in the Division's Brief, the  
 12 Georgia Bankruptcy Court correctly cites the statute as applying to all state securities law violations:  
 13 "Section 523(a)(19) expressly contemplates a postpetition determination of liability by a  
 14 nonbankruptcy forum for debts resulting from securities law violations as well as common law fraud,  
 15 deceit, or manipulation in connection with the purchase or sale of a security."<sup>9</sup> Here, A.R.S. § 44-  
 16 1962 is part of the State securities laws and governs securities salesman, like Respondent.  
 17 Consequently, violations of A.R.S. § 44-1962 are covered by 523(a)(19).

18 **The Commission should not consider hypothetical, future income as an offset to**  
 19 **restitution ordered.** As noted in its Brief, the amount of restitution ordered is governed by statute<sup>10</sup>  
 20 and Commission rule.<sup>11</sup> Respondent suggests that any restitution ordered should take into account the  
 21 possibility that LP could receive future income from the office condo, even though he sold the condo  
 22 for a set price of \$180,000. As yet, all the payments of the sale price have not been made. Still, as

23  
 24 <sup>7</sup> See also *In re Jafari*, 401 B.R. 494, 499–500, (Bankr. D. Colo. 2009) (Section 523(a)(19)(B) still requires that "the  
 25 liability determination occur outside of the bankruptcy forum, whether it occurs pre- or post-bankruptcy. Once liability  
 has been imposed, then either a bankruptcy court or a non-bankruptcy court may determine the application of this  
 nondischargeability statute." (Cited in Division's Brief).

26 <sup>8</sup> 11 U.S.C.A. § 523(a)(19).

<sup>9</sup> *In re Zimmerman*, 341 B.R. 77, 80 (Bankr. N.D. Ga. 2006)

<sup>10</sup> A.R.S. § 44-1962(B).

<sup>11</sup> R14-4-308(C)(1)(a) & (b).

1 stated in the Brief, the Division would accept considering the full sale price as an offset. If LP ever  
2 receives additional income above and beyond this sales price, evidence of such payments could be  
3 considered as an additional offset to any subsequent collection on the restitution ordered. Similarly, if  
4 another court orders Respondent to make payments to LP, evidence of such payments would also be  
5 considered as an offset in subsequent collections. That, however, is a collection matter and separate  
6 from this proceeding.

### 7 8 CONCLUSION

9 Repeating a portion of the Division's Brief: A.R.S. § 44-1962(A)(10) prohibits dishonest  
10 and unethical practices by a salesman in the securities industry. Commission Rule 14-4-130(A)(15)  
11 defines the unethical practice at issue: "Borrowing of money or securities by a salesman from a  
12 customer, except when the customer is a relative of the salesman or a person in the business of  
13 lending funds." As stated in the preamble to Title 14 of the Arizona Administrative Code, all  
14 persons who seek registration as a salesman must comply with the Commission Rules in Title 14.

15 LP, Ms. Wagner's customer, on her advice sold investment assets to invest in a real estate  
16 condo. The income from this investment would be generated by Ms. Wagner and her business. This  
17 transaction violated the Securities Act and LP ended up losing much of the value of the investment.

18 Based upon the evidence admitted during the administrative hearing and the arguments in  
19 the Brief and this Reply, the Division respectfully reiterates the requests for relief in the Brief.

20 RESPECTFULLY SUBMITTED June 4, 2015.

21   
22 Ryan J. Millicam  
23 Attorney for the Securities Division of the  
24 Arizona Corporation Commission  
25  
26

1 ORIGINAL AND EIGHT (8) COPIES of the foregoing  
2 filed on June 4, 2015, with:

3 Docket Control  
4 Arizona Corporation Commission  
1200 W. Washington St.  
Phoenix, AZ 85007

5 COPY of the foregoing emailed  
6 on June 4, 2015, to:

7 J. Murray Zeigler  
8 [murray@zeiglerlawgroup.com](mailto:murray@zeiglerlawgroup.com)  
229 W. La Vieve Ln.  
9 Tempe, AZ 85284-3022  
*Attorney for Respondent*

10 By:   
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26